

MEMORANDUM

DATE: August 30, 2018

TO: Chairman Sen Pat Connell, Vice Chair Rep Zach Brown, Members of the 2017-2018 Water Policy Interim Committee and Jason Mohr, Legislative Lead Staff member

FROM: Julie Merritt & Kyle Mace, Water Resources Specialists WGM Group, Inc.

CC: Brent Campbell, CEO WGM Group, Inc.

RE: Comments for WPIC on Committee Reports and Proposed Legislation

WGM Group, Inc. would like to thank the Water Policy Interim Committee (WPIC) for its hard work over this interim. We appreciate the opportunity to provide public comment on the reports the Committee has prepared and the bill drafts that the Committee is considering. Following are our comments on each of the reports and bill drafts.

A Right to Stream Conditions as They Existed: A Study of the Process for Changing a Water Right

The Committee made great use of its time investigating the topic of water right changes in general during this interim. As Representative Brown suggested during comments at the July meeting, there are some long-term considerations that could be worthy of further discussion. Based on our experiences, one of those items is the topic of mitigation changes. One possible future line of inquiry could be to examine mitigation changes, especially regarding mitigation for new public water supplies for residential developments and municipalities.

As you all know, water rights mitigation is a critical aspect of providing water for our growing communities. These types of applications often prove to be some of the most complex. We believe it would be worthwhile, perhaps during a future interim, to look closely at the mitigation process and determine if there could be improvements to the process.

Some specific comments we have on the report are as follows:

- On page 2 of the report under “Conclusions”
 - One conclusion we had hoped the committee had reached is the relationship between population growth in closed basins and the need for water right changes to provide mitigation water for that new

development. The need for mitigation changes is going to steadily increase over the next years and decades. These types of applications are complex and we believe there are steps that could be considered to reduce the uncertainty in the change process for applicants.

- On page 5 in Figure 1
 - Box 4 states “DNRC may meet with applicant to discuss deficiencies”. Under the current statute, this is not an accurate description of this step in the process. Currently, this step allows for the DNRC to issue one deficiency letter and the applicant may have up to 90 days to respond.
- In the discussion of harm to a water right, we would like to call attention to an idea that Mr. Byorth of Trout Unlimited spoke to during his testimony at the May WPIC meeting in Bozeman. Specifically, the concept that it is not the applicant’s responsibility to prove no adverse effect will ever occur. Rather, it is the applicant’s responsibility to provide a preponderance of evidence that adverse effect is unlikely to occur. I
 - In particular, we are concerned about the use of the quote from David Getches *Water Law in a Nutshell* at the top of page 6 that appears to be inconsistent with our understanding of the change application requirements.
 - In addition, the last sentence at the top of page 7 reads, “It is up to the department to ultimately determine if a water right as adversely affected by a change.” We believe it would be more accurately stated as, “It is up to the department to ultimately rule if the applicant has provided adequate evidence that there will be no adverse effect.” While we recognize this may seem nit-picky, we believe this distinction is important to the overall understanding of the responsibilities of the parties, applicants and the department, in a change proceeding.
 - Similarly, at the top of page 6 there is discussion about how adverse effect was treated under pre-1973 law and a reference to how the “...burden of proof was switched.” under the Water Use Act. A “switch” in this instance could be interpreted as the inverse, i.e. if under pre-73 law an effected appropriator had to prove that adverse effect was in fact occurring due to a change then under the Water Use Act an applicant is required to prove that in fact no adverse effect will occur. We believe it would be more accurate to say that the burden shifted. The applicant is required to provide a preponderance of evidence not to absolutely rule out every possibility of adverse effect.
- Our final comment on the report is regarding the statement from the department on page 17 about average change application processing times. It is our belief that this “average” includes a number of applications that do not require a much lower level of effort to process. Specifically, we contend the average reported by the department includes applications for additions of stock tanks only. The department acknowledges that these types of applications are far less time-consuming to process by the fact that the filing fee for such applications is only \$200 compared to the \$900 filing fee charged for other types of changes. In addition, it appears that applications involving Conservation District water reservations may also have been included in the

calculation of the average processing time. A closer look at these application files reveals that they have often spent many months in processing at the Conservation District office before they are stamped as received at a DNRC Water Resources Division office. From the point of view of an applicant, it hardly matters which office has been working on an application. These discrepancies should be noted by the Committee and the public.

The Exemption at 45: A study of Groundwater Wells Exempt from Permitting

We have very few comments on this report. One item of note in our opinion is a corollary to the final bullet point under "Conclusion". In addition to the 2016 Supreme Court decision potentially altering development patterns, it is also likely to increase the need for new water right permits for new development and consequently, more change applications in closed basins to supply mitigation.

LCw002

We are supportive of the proposed modifications to 85-2-235 regarding 'Appeals' with the correction to the deadline that was discussed during the July meeting. We are however, concerned about the proposed language under 85-2-233(e). This appears to eliminate the possibility of filing post-decree amendments to water rights.

While we understand that the existence of a process to file post-decree amendments could lead to the possibility of an ever-shifting landscape, it is also a tool that occasionally really needs to be made available to water right owners. It appears from the proposed language that if this modification were passed, the practice would be terminated without an opportunity for potentially affected water right owners to consider if this process is something they need to employ. Perhaps a timeframe could be developed as is proposed for the appeals.

LCw003

As I believe Mr. Mohr indicated during discussion of this item at the July meeting, this proposed language does not address concerns with the "black hole" (actually, I think we've referred to it as the "gray area" which is much less daunting than a black hole). That said, we really don't have any opposition to the proposed modification of the deadline. We would be very interested in continuing the discussion about the gray area/black hole issue. The response we received from the department when we have raised concerns is that if we tighten up the timelines to eliminate the gray area, the department will be forced to terminate more applications. We are hopeful that some middle ground could be found that could both provide the applicant more certainty on the timeframe of processing and not unduly burden the department.

LCw004

We have the same confusion about the language in this proposed bill. After speaking with Mr. Byorth at TU, we believe we generally understand the issues this bill draft was attempting to address. However, as others noted during public comment at the July meeting, it is unclear if the proposed language speaks directly to the issue. We

are hopeful that more clarity can be reached if this bill draft progresses through the process.

LCw005

We agree with others who made public comment during the July meeting that the reference to legal availability analysis in the section proposed for modification is redundant. Our concern is perhaps an aside. While we assumed at first that the ability of an applicant to obtain a waiver from a neighboring water user applied to both permit and change applications, the existence of this language within 85-2-311 (Criteria for Issuance of a Permit) and NOT within 85-2-402 (Changes in Appropriation Rights) leaves us questioning if the waiver can be used in the instance of a change application. Would it be possible to clarify this point?

DNRC comments on LCw010

Representative Connell

The Water Resources Division of the MT DNRC provides the Water Policy Interim Committee with the following comments on the Clark Fork & Kootenai River Basin Council's proposed changes to §85-2-203 – State Water Plan

Section (3) – While the department generally supports the inclusion of the Kootenai basin in 85-2-203(3) we are concerned with the fiscal impact of this change. DNRC's state water planning activities are carried out by 2-person teams consisting of a hydrologist and water resource planner. There is one team assigned to each of the four planning basins: Clark Fork, Upper Missouri, Lower Missouri, and Yellowstone. WRD does not have the resources to establish a planning team for the Kootenai basin. WRD will require additional funding for two new FTE plus operating expenses to support separate planning activities in the Kootenai basin.

Section (3)(f) – The department opposes calling out concerns with water permitting in this section. Water Resource concerns addressed in the 2014 basin plans were brought forward by the individual basin councils. Calling out water permitting in this section is in effect elevating this concern above all other water resource concerns and removing the flexibility of the basin councils to determine their own priorities. In addition, proposed legislative changes to address concerns with the water permitting process in one planning basin would by law, apply to all the other planning basins. A consequence of the proposed change could be to give a small group of 20 people in one basin the ability to draft legislation that would affect water users statewide. Finally, water permitting is a complex and contentious process guided by the Water Use Act, case law and administrative rules. WRD does not feel that basin planning councils established under §85-2-203 are the proper venue for developing proposed legislative changes that may affect water rights.

Section (3)(h) – WRD opposes adding the requirement for the basin plans to address invasive species. Through the Montana Invasive Species Council (MISC) and the Upper Columbia Conservation Commission (UC3) Montana has two robust programs for addressing the very real threat posed by invasive species. Adding invasive species to the basin planning process would be duplicative of the work being carried out by MISC and UC3.

Section (4)(d) – The requestors of this change may not be aware that the department does not implement recommendations in the individual basin plans. The department implements recommendations in the state water plan, which are drawn from the basin plans, but are not specific to an individual basin.

From: Abigail St. Lawrence
To: Mohr, Jason
Cc: Steve Snezek
Subject: Re: WPIC bill draft on legal availability and change applications
Date: Tuesday, August 21, 2018 12:39:14 PM

Jason-

The issue my clients have had in change applications is not legal availability analysis under 85-2-311, as that's not a criteria that's considered during the change process. The biggest issues are how return flow analysis and general historical use analysis under Admin. R. Mont. 36.12.1902 is applied. Specifically, what is happening is that the water right to be changed has to be proven up in all elements and is not given prima facie status, even if it is an adjudicated right, whereas in determining adverse effect, the potentially impacted rights are assumed to be used at the max allowed in the paper right.

While I hate to get too specific in statute, I propose to take the historical use element out of rule and add it as an additional criteria, including a statement that adjudicated rights are given prima facie status, similar to the status granted to filed claims under 85-2-227. I would also add language under 85-2-402(2)(a) that applicants have the option to demonstrate that potentially adversely impacted rights are different than what appears in the claim file. I'd be happy to work with you on this language in more detail, so please don't hesitate to get in touch. Thanks.

-Abby

PS—I'm copying Steve Snezek with MBIA on this email so that he is in the loop.

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This message may contain confidential privileged material, including attorney-client communications and attorney work product. This electronic transmission does not constitute a waiver of privilege. Please contact sender immediately if you have received this message in error. Thank you.

From: "Mohr, Jason" <JasonMohr@mt.gov>
Date: Tuesday, August 7, 2018 at 7:50 AM
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Cc: "Bills, Erin" <Erin.Bills@mt.gov>

Subject: WPIC bill draft on legal availability and change applications

On July 17, the Water Policy Interim Committee voted unanimously to ask interest groups and stakeholders for your ideas concerning bill draft LCw004, "Clarify that legal availability analysis does not determine adverse effects as criteria in a water right change application."

Please send any suggestions (or general comments) you may have to me by Aug. 24. I'll draft as many options as necessary.

Please note that I'm working remotely until Aug. 16, so email is the best way to contact me until then.

Thanks,

Jason Mohr, research analyst
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September 7, 2018

Water Policy Interim Committee 2017-18

Montana Legislature

Dear Chair Connell, Vice Chair Brown, and Members of the Montana Water Policy Interim Committee,

At your July 16-17, 2018, meeting, the Executive Committee of the Clark Fork and Kootenai River Basins Council (CFKRBC) requested that your committee sponsor legislation to revise section 85-1-203 MCA, the State Water Plan statute. We submitted draft language for the revision of that statute (largely drafted by former Senator Verdell Jackson and myself) and you voted to direct your legislative committee staff member, Jason Mohr, to work with that language to draft a committee bill to be ready for public comment and committee consideration at your upcoming September 10, 2018, committee meeting. He prepared that bill (LCw010 - Revise laws related to river basin councils) and it was posted to your website and the public notified that public comment on it would be accepted.

The Water Resources Division of the Montana Department of Natural Resources and Conservation provided you with comments on the proposed changes to the statute on September 7, 2018, and we are writing now to address those comments. The agency comments correspond to each bullet below, and the response of the CFKRBC Executive Committee are provided in the un-bulleted text that follows each.

- **Section (3)** – While the department generally supports the inclusion of the Kootenai basin in 85-2-203(3) we are concerned with the fiscal impact of this change. DNRC's state water planning activities are carried out by 2-person teams consisting of a hydrologist and water resource planner. There is one team assigned to each of the four planning basins: Clark Fork, Upper Missouri, Lower Missouri, and Yellowstone. WRD does not have the resources to establish a planning team for the Kootenai basin. WRD will require additional funding for two new FTE plus operating expenses to support separate planning activities in the Kootenai basin.

One of Montana's major river basins, the Kootenai River basin is not addressed in 85-1-203. It was addressed in the basin and state water plan development process by adding representation to the Clark Fork Task Force to create a Clark Fork and Kootenai River Basins Council which has since effectively become the CFKRBC. We believe that inclusion of the Kootenai in the planning process required little in the way of additional resources to the planning effort leading to the 2014 Clark Fork and Kootenai River Basins Water Management Plan. Furthermore, it is the goal of the CFKRBC to assist DNRC with streamlining the planning effort by intentionally including the Kootenai in our ongoing work to partner on plan development and implementation – this serves to reduce or negate any fiscal impacts associated with naming the Kootenai in statute.

- **Section (3)(f)** – The department opposes calling out concerns with water permitting in this section. Water Resource concerns addressed in the 2014 basin plans were brought forward by the individual basin councils. Calling out water permitting in this section is in effect elevating this concern above all other water resource concerns and removing the flexibility of the basin councils to determine their own priorities. In addition, proposed legislative changes to address concerns with the water permitting process in one planning basin would by law, apply to all the other planning basins. A consequence of the proposed change could be to give a small group of 20 people in one basin the ability to draft legislation that would affect water users statewide. Finally, water permitting is a complex and contentious process guided by the Water Use Act, case law and

administrative rules. WRD does not feel that basin planning councils established under §85-2-203 are the proper venue for developing proposed legislative changes that may affect water rights.

This is a fair objection and we recommend that the draft language in 3(f) reading “including water right permitting;” should not be included in the bill (please remove).

- **Section (3)(h)** – WRD opposes adding the requirement for the basin plans to address invasive species. Through the Montana Invasive Species Council (MISC) and the Upper Columbia Conservation Commission (UC3) Montana has two robust programs for addressing the very real threat posed by invasive species. Adding invasive species to the basin planning process would be duplicative of the work being carried out by MISC and UC3.

This too is a fair objection and we recommend that item 3(h) should be removed from the bill.

We further request that item 3(i), “a forum for all people to communicate about water issues” be removed, given that this is a legal requirement that must be followed under Montana’s open meeting laws during the water planning process.

We also request that item 3(g), “identified data gaps and water management issue;” be reordered to become item 3(b) and all remaining items be appropriately relabeled.

- **Section (4)(d)** – The requestors of this change may not be aware that the department does not implement recommendations in the individual basin plans. The department implements recommendations in the state water plan, which are drawn from the basin plans, but are not specific to an individual basin.

We assert that the bill addresses both the state and basin water planning processes. The existing language in 4(d) reads “Each water user council shall make recommendations to the department on the basinwide plans required by subsection (3).” We believe this is somewhat circular (i.e., the councils are making recommendations on the plans they are developing?), and that the suggested revision (“make recommendations to the department on the development and implementation of...”) repairs this section. Any council should be able to make recommendations on how their basin plans are developed, and those plans should include recommendations on how the plan goals should be achieved via implementation. Having the ability to address implementation is a critical and necessary part of the planning process. It could be argued that this is implied in the existing statute, but that is unclear.

The Executive Committee of the Clark Fork and Kootenai River Basins Council appreciates your consideration of the draft bill and the responses we’ve offered here.

On behalf of the Executive Committee of the Clark Fork and Kootenai River Basins Council,

David Shively

Mohr, Jason

From: Erin Farris-Olsen <erin@mtwatersheds.org>
Sent: Friday, September 07, 2018 11:32 AM
To: connell4sd43@yahoo.com
Cc: Zachary Brown; Cohenour, Jill; Welborn, Jeffrey; Brown, Bob; Laura Nowlin; Sesso, Jon; JohnFlemingStIgnatius@gmail.com; Glimm, Carl; Jen Downing; Mohr, Jason
Subject: MWCC Comments on LCw008

Dear Chairman Connell and members of WPIC,

I am currently on maternity leave so unfortunately won't be able to make the WPIC meeting on September 10th. At least one of our board members and Watershed Coordinator for the Musselshell Water Coalition will be there to provide public comment on LCw008 as a participant of the stream gage stakeholder group and representative of MWCC.

In lieu of my absence, I want to provide the committee members a brief update on our activities and thoughts on LCw008.

- This bill will formalize the activities of our stakeholder group to meet a list of desired coordination outcomes. The bill specifically amends the Governor's Drought and Water Supply Committee statute to provide oversight for an ongoing stream gage network work group.
- MWCC & DNRC presented the concept of LCw008 to the Governor's Drought and Water Supply Committee on August 18th and committee members are supportive of providing oversight for the work group.
- MWCC has contributed to the draft bill and approves of its contents generally.
- Given the short bill drafting turn around time, the stakeholder group was able to contribute to edits but not review the final version you have to consider. Final approval by the stakeholder group would be preferable. If the committee could approve the bill draft, contingent on final stakeholder group approval that would be great. If that's not an option, we would support the bill as is.
- MWCC is also interested in helping coordinate this bill with a DNRC bill draft that makes numerous revisions to the Governor's Drought and Water Supply Committee. DNRC's bill was introduced to the Governor's Drought and Water Supply Committee on August 18th. LCw008 was not yet drafted at that time but we had a general discussion about the two bills being complimentary to one another and able to move forward together if possible.

Overall, the significance of LCw008 is to continue the coordination and filling of information and funding gaps identified as a result of the stream gage funding challenges in 2017-2018. We hope the committee considers this bill a significant step forward in preventing some of the communication and information needs identified over the last year.

Thanks for you help and consideration of this important issue.

Best,

Erin Farris-Olsen

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